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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 591

MARCEL RODD,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT, AND BRIEF IN
SUPPORT THEREOF.**

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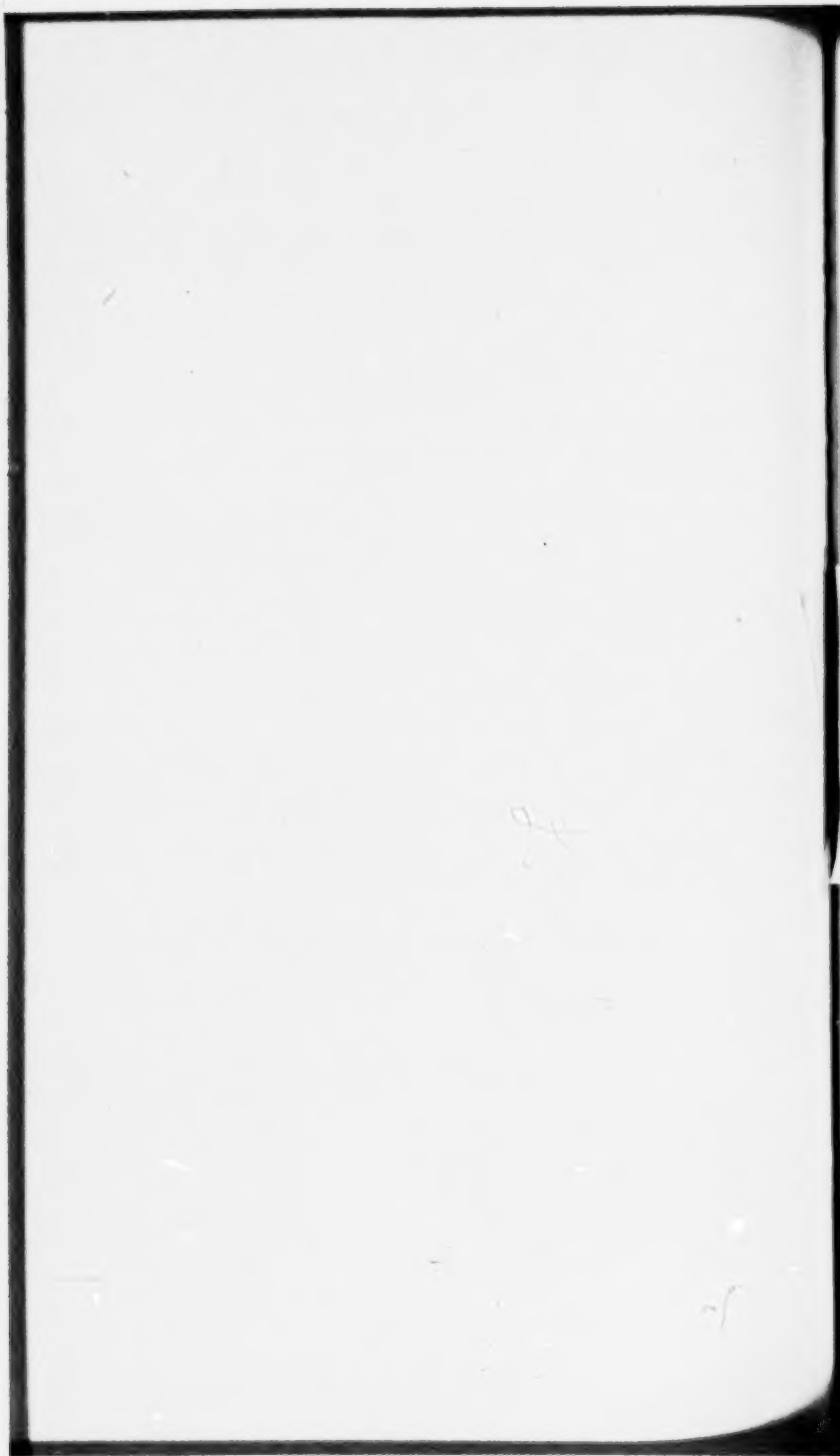
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1947.

No. _____

MARCEL RODD,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.**

*To the Honorable the Chief Justice of the United States
and the Associate Justices of the Supreme Court of
the United States:*

Petitioner, Marcel Rodd, respectfully applies for the allowance of a writ of certiorari to review a decision of the Circuit Court of Appeals for the Ninth Circuit, entered on December 16, 1947 (R. 65) affirming a judgment of the District Court for the Southern District of California, Southern Division, entered on August 29, 1946 (R. 18-20).

The indictment (R. 2-3) in two counts charged the petitioner with separate violations of Sec. 245 of the Criminal Code, United States Code, Title 18, §396 (set forth in full

in Appendix A). Petitioner waived jury trial and was found guilty on both counts (R. 45). Separate punishment was given on each count of the indictment. Petitioner was fined \$2,500 on Count One and the imposition of sentence on Count Two was suspended for a period of two years upon certain conditions of probation (R. 18-20).

Opinion of the Court Below.

The District Court (Harrison, D. J.), filed no opinion. The Circuit Court of Appeals, in affirming the judgment below, wrote an opinion (R. 60-64) (per Mathews, C. J.) which is not yet reported.

Jurisdiction.

The jurisdiction of this Court is invoked under Judicial Code, §240(a), 28 U. S. C., §347(a). The judgment of the Circuit Court of Appeals was entered on December 16, 1947 (R. 65). The time for filing this petition was extended to and including February 14, 1948 by order of this Court dated January 8, 1948.

Questions Presented.

1. Does the conviction of petitioner under Count One of the Indictment herein violate the provisions of the Fifth Amendment to the Constitution of the United States relating to double jeopardy because that Count fails to allege the place where the alleged crime was committed?

2. Does the conviction of petitioner under Count One of the Indictment herein violate the provisions of the Sixth Amendment to the Constitution of the United States requiring that the accused be informed of the nature and

cause of the accusation against him, because that Count fails to allege the place where the alleged crime was committed?

3. Assuming that the answer to Question 1 or Question 2, or both, is in the affirmative, was the stated defect in Count One of the Indictment "waived" by petitioner?

4. Assuming that the answer to Question 1 or Question 2 or both is in the affirmative, was the stated defect in Count One of the Indictment "cured" by Count Two of the Indictment or by the evidence adduced at the trial?

5. Since Count One of the Indictment herein does not specify the place where the alleged crime was committed, did not the District Court's taking of jurisdiction herein violate the mandates of Article III, Section 2 and of the Sixth Amendment to the Constitution of the United States?

6. Was the Court below in error in construing the offense charged, namely, the "causing to be deposited" of obscene matter, to be synonymous with the offense of "causing the delivery" of such matter, especially in view of the expressed refusal of Congress to declare criminal "causing the delivery" of obscene matter?

7. Did not the conviction of petitioner in the District Court of California for causing the deposit of obscene matter as alleged in Count One of the indictment violate Article III, Section 2 and the Sixth Amendment to the Constitution of the United States since the evidence as to Count One specifies in relation to California merely that the allegedly obscene matter was delivered there by the carrier?

8. Assuming that petitioner's conviction under Count One of the Indictment violated Article III, Section 2 and

the Sixth Amendment to the Constitution of the United States, did petitioner "waive" this defect?

9. Should the question of "waiver of jurisdiction" expressly left unanswered by this Court in *Hagner v. United States*, 285 U. S. 427 (1932), and *United States v. Anderson*, 328 U. S. 699 (1946) be answered in the case at bar?

10. Was petitioner's conviction on two separate counts for doing a single act a violation of the double jeopardy provisions of the Fifth Amendment to the Constitution of the United States?

11. Was petitioner properly convicted under Count Two of the indictment herein alleging that he caused obscene matter "to be taken" from the mail, solely on the basis of evidence that he had "caused the deposit" of such matter for carriage and that it was in fact delivered?

12. Since neither the District Court nor the Court below made any inquiry or finding pursuant to the "clear and present danger rule" heretofore enunciated by this Court in cases like the case at bar involving restraints on freedom of the press, does not petitioner's conviction herein abridge his rights guaranteed by the First Amendment to the Constitution of the United States?

Statutes and Constitutional Provisions Involved.

The statute defining the crime here alleged (Criminal Code, §245, 18 U. S. C., §396) provides in part (the statute is set forth in full as Appendix A) as follows:

"Whoever shall bring or cause to be brought into the United States, or any place subject to the juris-

diction thereof, from any foreign country, or shall therein knowingly deposit or cause to be deposited with any express company or other common carrier for carriage from one State * * * to any other State * * * any obscene, lewd or lascivious, or any filthy book, * * * or whoever shall knowingly take or cause to be taken from such express company or other common carrier any matter or thing the depositing of which for carriage is herein made unlawful, shall be * * *."

The provisions of the United States Constitution here involved are as follows:

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed".

Article III, Section 2.

"Congress shall make no law * * * abridging the freedom * * * of the press * * *".

Amendment 1.

"* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *".

Amendment 5.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation * * *".

Amendment 6.

The Statute (Judicial Code, §72, 28 U. S. C., §145) describing the jurisdiction of the District Court of the United States for the Southern District of California, wherein the petitioner was convicted, provides, in part, as follows:

“The State of California is divided into two districts, to be known as the northern and southern districts of California. The southern district shall include * * * the territory embraced * * * in the counties of San Diego * * *”.

Specification of Error.

The Circuit Court of Appeals erred in affirming the judgment of conviction as to petitioner, and in failing to reverse such judgment and order the indictment dismissed.

Summary Statement of the Matters Involved.

Statement of Facts.

Count One of the indictment (R. 2) charges that petitioner on December 31, 1945 knowingly and feloniously caused to be deposited with a common carrier, National Carloading Corp., 100 copies of a book, alleged to be obscene, entitled *Call House Madam*, by Serge G. Wolsey, for carriage from Brooklyn, New York, to Ye Olde Book Shoppe, San Diego, California. There is no allegation of the place where the deposit was made; and there are no allegations as to the place where or the acts by which petitioner did the “causing”.

Count Two (R. 3) charges that petitioner, on December 31, 1945 knowingly and feloniously caused to be taken from the carrier at San Diego the same books which had been

deposited on December 14, 1945 in Brooklyn for carriage to San Diego.

The conviction is posited upon a stipulation of facts dated July 23, 1946 (R. 8-10) and a very brief trial. The stipulation states that petitioner Marcel Rodd, doing business as The Marcel Rodd Company in Hollywood, California, is a distributor of *Call House Madam*. It further states that on December 14, 1945, pursuant to an order from Ye Olde Book Shoppe in San Diego, petitioner caused the copies of the books to be deposited with the carrier for carriage to the book shop in San Diego. It does not specify the place where or the acts by which petitioner did the "causing". And finally it states that the copies were carried by the carrier from Brooklyn to San Diego, arriving on December 31, 1945 and were *delivered by the carrier* to Ye Olde Book Shoppe, which *accepted delivery*. There is no proof that petitioner did "take" the books or "cause them to be taken" from the carrier in San Diego. Thus the sole act alleged or proved as to petitioner was that he caused, at a place unspecified, the books to be deposited with the carrier for carriage from Brooklyn to California and this single act grounded the conviction on both counts. At the trial the prosecution merely put in evidence (R. 32) a copy of the book and the above mentioned stipulation.

Petitioner moved to dismiss the indictment on the ground that the evidence was insufficient to establish the offense charged, which motion was denied (R. 34). He then offered in evidence (R. 35) a stipulation concerning the sale and distribution of *Call House Madam*. The stipulation (R. 10-12) states that the book has been published for four years and has been widely distributed throughout the country; that it has been sold by, among others, the United States Army Command, Army Post Exchanges, the Brentano and Doubleday bookstore chains,

the American News Company, a great many department stores including Marshall Field (Chicago), A. C. Vromans, Inc. (Pasadena), Bullock's, Robinson's and The May Company (Los Angeles) as well as religious book societies such as the American Methodist Publishing House and the American Baptist Publication Society.

The Reporter's Transcript of Proceedings (R. 31 *et seq.*) does not reveal any additional evidence except that petitioner had read the book in 1942 (R. 41).

After petitioner had been found guilty, he moved for a new trial (R. 14), which motion was denied (R. 47) prior to sentence.

Reasons for Allowance of Writ.

1. Since Count One of the indictment does not specify the place where the alleged crime was committed, the conviction based thereon violated rights of petitioner guaranteed by the Fifth and Sixth Amendments to the United States Constitution; the decision of the Court below sustaining that conviction is in probable conflict with the applicable decisions of this Court and other Circuit Courts of Appeals.

2. The decision of the Court below sustaining the jurisdiction of the District Court as to Count One is in probable conflict with the applicable decisions of this Court and other Circuit Courts of Appeals construing Article III, Section 2 and the Sixth Amendment of the Constitution of the United States. Moreover, the decision "legislated" a result which the Congress itself has refused to enact, and it raises important questions of Federal law which have in terms not been (*Hagner v. United States*, 285 U. S. 427 and *United States v. Anderson*, 328 U. S. 699), but which should be, decided by this Court.

3. In upholding convictions for two separate crimes based on the same act, the Court below sanctioned the placing of petitioner in double jeopardy in violation of the Fifth Amendment to the United States Constitution and the applicable decisions of this Court, and erroneously disregarded all prior administrative construction of the act in question.

4. Since the instant case involves rights guaranteed by the First Amendment to the United States Constitution, and the Court below made no attempt to apply the "clear and present danger" test to it, the decision below is in probable conflict with applicable decisions of this Court.

POINT I.

Since Count One of the indictment does not specify the place where the alleged crime was committed, the conviction based thereon violated rights of petitioner guaranteed by the Fifth and Sixth Amendments to the United States Constitution; the decision of the Court below sustaining that conviction is in probable conflict with the applicable decisions of this Court and other Circuit Courts of Appeals.

A. Count One fails to meet the requirements imposed by the provisions of the United States Constitution.

It is elementary that a defendant in a criminal case must be informed of the nature of the offense charged against him, and the time and place of its alleged commission. The indictment must clearly "earmark" the particular offense so as to separate it from the general charge, and must specify each element of the crime. This requirement is of the essence. It flows from the provisions of the Sixth

Amendment to the United States Constitution that the accused "shall be informed of the nature and cause of the accusation," as well as those of the Fifth Amendment relating to double jeopardy.

Count One of the indictment (R. 2) reads in part as follows:

"On or about December 31, 1945, Marcel Rodd did knowingly and feloniously cause to be deposited with a common carrier, to wit: National Carloading Corporation, for carriage from Brooklyn, State of New York, to San Diego, San Diego County, State of California, within the Southern Division of the Southern District of California, 100 copies of a certain book entitled CALL HOUSE MADAM * * *."

As indicated elsewhere in this brief (*infra*, Point II), the only reasonable inference from "cause to be deposited" is that the actual depositing was done by an agent—the supply of books presumably being in Brooklyn—and not by petitioner himself. The alleged crime, then, was the act of instructing someone to forward the books. Count One sets forth the point of origin and the point of destination of the shipment. It is unclear as to where the deposit took place; and more important, *it does not specify where petitioner did the things that caused the deposit*. Even if under Count One the point of origin of the shipment could be reasonably construed to be the place of deposit, the place of commission of petitioner's acts remains unspecified.

This Court has stated the applicable rule as follows in *United States v. Hess*, 124 U. S. 483, 486 (1888):

"* * * the universal rule on this subject is, that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. *No essential element of the crime can be omitted without destroying the*

whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly, and not inferentially or by way of recital." (Italics supplied.)

The rationale of this demand for particularity is the need of the defendant to be apprised of the charge against him, not only to enable him to prepare his defense, but more importantly, to enable him to plead double jeopardy to a subsequent indictment. *Ball v. United States*, 140 U. S. 118, 136 (1891); *Rosen v. United States*, 161 U. S. 29, 34 (1896). In the *Ball* case, the indictment for murder failed to allege the time and place of death. The omission provoked this Court to state (p. 136):

"All of the essential ingredients of the offense charged must be stated in the indictment, embracing with reasonable certainty the particulars of time and place, that the accused may * * * avail himself of his acquittal or conviction against any further prosecution for the same cause."

In sustaining Count One of the Indictment, despite its failure to specify the place where the acts charged were committed, the Court below went counter to the relevant precedents in this Court. Its decision is also in probable conflict with those of other Circuit Courts of Appeals in like cases.

In *Skelley v. United States*, 37 F. (2d) 503, (C. C. A. 10, 1930), the indictment charged illegal transactions in opium "at Oklahoma City, Oklahoma, in the Western District of Oklahoma." On appeal, the conviction was reversed. The Court pointed out that Oklahoma City had a population of 150,000 and that there were innumerable places there where the crime might have been committed. Therefore, the Court held that the Fifth and Sixth Amendments to the

United States Constitution had been violated. In accord are decisions of the Court of Appeals for the Eighth Circuit in *Jarl v. United States*, 19 F. (2d) 891 (1927); *Corcoran v. United States*, 19 F. (2d) 901 (1927); and *Partson v. United States*, 20 F. (2d) 127 (1927).*

In the *Partson* case, for example, the indictment charged operation of a still in St. Louis, Mo., with intent to defraud the United States of the taxes on the spirits produced. This is infinitely more specific than Count One of the Indictment at bar which doesn't allege any place at all. In the *Jarl* case the indictment charged illegal transportation of liquor in Omaha, Neb. The Circuit Court of Appeals pointed out (19 F. (2d) at 892) that the place from which and the place to which the transportation was made were not specified; that the indictment was silent as to the method of transporting—whether by truck, wagon or automobile; in short, there was nothing to distinguish this transaction from countless other transactions. The same is true of the indictment herein—only more so. Was the “causing” herein done by mail, telephone, cable, letter or word of mouth? Where was it done? Count One of the indictment gives no answer.

The city where the alleged crime of “causing” took place is not mentioned at all; there is not even an allegation of the Federal District where it occurred. It could

* Although the Court below cited no cases in support of its holding that Count One was adequate despite the utter failure to allege the place where the acts charged were committed, it may have had in mind its own prior decisions in *Fiddelke v. United States*, 47 F. (2d) 751 (1931) and *Parmagini v. United States*, 42 F. (2d) 721 (1930), and the decision of the Second Circuit in *United States v. Busch*, 64 F. (2d) 27 (1933), cert. den. 290 U. S. 627. These cases do not support the decision below. In both the *Fiddelke* and *Parmagini* cases, the date and city where the alleged offense took place were indicated. In the *Busch* case the indictment stated the crime was committed “at the Southern District of New York and within the jurisdiction of the Court.”

have been committed anywhere in or outside of the United States.

Moreover, the crime here charged is not murder or opium-dealing, the incidence of which is relatively low. It is transporting books. Petitioner is in the book business and was the exclusive distributor of the book in question (R. 11). The volume was widely distributed throughout the country, to department stores, bookstore chains and department stores (R. 11). The fair inference is that petitioner had made numerous shipments of it. There is nothing in the Record to suggest that the shipment under indictment was the only one ever made to Ye Olde Book Shoppe in San Diego; since the book was published in 1941 (R. 11) the reasonable assumption is that the Book Shoppe had been reordering the book from time to time, and that prior shipments had been made from Brooklyn. Therefore, petitioner in the instant case is in much graver danger of double jeopardy than the average defendant convicted on a defective indictment.

B. There Has Been, and Could Be, No "Waiver" of the Insufficiency of Count One of the Indictment.

To avoid the impact of the decisions discussed above, the Court below held that the failure to allege the place where the acts charged were committed was "waived" by petitioner's failure to object on this ground at the trial. This ignores the facts. Petitioner moved to dismiss the indictment at the trial (R. 7), and subsequently moved for a new trial (R. 14). But there can be no "waiver" in any event and in holding that there was, the decision below went counter to the relevant decisions of this Court as well as other Circuit Courts of Appeals. As this Court has held "the omission [of a material element of the crime] cannot

be supplied by intendment or implication." *United States v. Hess, supra* at p. 486. Words used by the Circuit Court of Appeals for the Ninth Circuit in another case apply *a fortiori* to the case at bar where as shown, petitioner did object to the indictment:

"* * * there was in the Court below no demurrer to the indictment; no motion to quash it, or bill of particulars demanded; no motion for a new trial or in arrest of judgment; no specific exception to any of the instructions given by the court to the jury; and only a general exception taken to the refusal of the requested instructions. Notwithstanding all that, if as contended on behalf of the plaintiff in error, the indictment fails to state facts sufficient to constitute the crime charged, the judgment of conviction cannot, of course, be sustained."

Sonnenberg v. United States, 264 Fed. 327, 328 (1920).

Other Circuit Courts of Appeals have likewise recognized that a failure, such as is presented herein, to allege "an essential element of the crime" is a defect of vital substance, not of form,* and that therefore, it cannot be waived. Thus such a failure can be asserted for the first time on appeal. *Harris v. United States*, 104 F. (2d) 41, 43 (C. C. A. 8, 1939). Indeed it has been held in another Circuit that an appellate court should of its own motion

* Therefore, Section 556 (18 U. S. C.) dealing with defects of form does not apply in the case at bar. As the Court in the *Harris* case, *infra*, pointed out, with reference to the omission of an essential allegation of an indictment (104 F. (2d) at 45):

"While the strict requirements and the formalities of criminal pleading under the common law rules have been modified by modern practice and statute (Section 556, 18 U. S. C. A.), this does not mean that matters of substance may be omitted from the allegations of an indictment."

consider a defect in the indictment that results in insufficiency. *Danaher v. United States*, 39 F. (2d) 325, 331 (C. C. A. 8, 1930). It is the duty of this Court, we submit, to set aside the judgment herein. See *United States v. Carll*, 105 U. S. 611 (1882).

C. The defect cannot be cured by construing the two counts of the indictment together or by looking at the evidence at the trial.

It cannot be argued in the case at bar that the failure of Count One to allege where the crime charged was committed can be cured by construing the two counts of the indictment together. This Court has held that, in theory and in fact, each count constitutes a separate indictment. *Dunn v. United States*, 284 U. S. 390, 393 (1932); *Selvester v. United States*, 170 U. S. 262, 263 (1898). Even if, however, the two counts involved in the indictment herein were to be construed together, Count One would still be fatally defective. For Count Two (R. 3) throws no more light than Count One on the place where the crime was supposedly committed. If anything, it causes some confusion in terms of the time when the alleged offense was supposed to have taken place. It alleges the deposit with a carrier in Brooklyn on December 14, 1945, whereas Count One alleges the date to be December 31, 1945. Therefore, even if the indictment is taken as a whole, the substantive defect is not corrected.

Nor does the evidence adduced at the trial cure the defect here involved. In the first place, it is well settled that evidence is not relevant on the legal sufficiency of an indictment, since the evidence at the first trial would not be admissible at a second trial on a plea of double jeopardy. In *Fontana v. United States*, 262 Fed. 283 (C. C. A. 8, 1919), the Court in reversing a conviction under the Espionage Act stated (p. 287):

"Nor were the charges in this indictment so certain and specific that upon conviction or acquittal thereon it or the judgment upon it constitute a complete defense to a second prosecution of the defendant for the same offense. In determining this question the *evidence on the trial may not be, and the indictment and the judgment alone can be, considered, because the evidence does not become a part of the judgment*, and as the indictment states no facts upon which the time, places, or occasions on which the respective statements therein were alleged to have been made can be identified, the indictment and judgment failed to identify the charges so that another prosecution therefor would be barred thereby. *Florence v. United States*, 186 Fed. 961, 962, 964, 108 C. C. A. 577, 578, 580, and cases there cited; *Winters v. United States*, 201 Fed. 845, 848, 120 C. C. A. 175, 178." (Italics supplied.)

Second, the evidence here, even if it were held capable of curing the defect in the indictment, does not cure it. The only proof as to the facts is contained in the stipulation of July 23, 1946 (R. 8-10), and this does not mention the place where petitioner committed the crime of "causing" alleged in Count One.* The judgment of conviction itself (R. 18) is equally silent on the place where the offense alleged in Count One was committed.

It is thus clear that in sustaining the sufficiency of Count One herein, the Court below sanctioned a violation of rights guaranteed petitioner by the Fifth and Sixth Amendments as they have been construed by this Court and other Circuit Courts of Appeals.

* The Stipulation states where the deposit took place, but is wholly devoid of any specification as to where petitioner's act or acts causing the deposit to be made were committed.

POINT II.

The decision of the Court below sustaining the jurisdiction of the District Court as to Count One is in probable conflict with the applicable decisions of this Court and other Circuit Courts of Appeals construing Article III, Section 2 and the Sixth Amendment of the Constitution of the United States. Moreover, the decision "legislated" a result which the Congress itself has refused to enact, and it raises important questions of Federal law which have in terms not been (*Hagner v. United States*, 285 U. S. 427 and *United States v. Anderson*, 328 U. S. 699), but which should be, decided by this Court.

In sustaining the validity of Count One despite its failure to allege where the crime charged was committed, the Court below upheld, contrary to Article III, Section 2 and the 6th Amendment of the United States Constitution, as well as applicable statutes and decisions of this Court and of other Circuit Courts of Appeals, a totally invalid exercise of jurisdiction by the District Court and it reached a result which the Congress itself has specifically refused to bring about. In this aspect of the case, the decision below goes counter to the fundamentals of our federal judicial system.

- A. Trial of an offense in a jurisdiction where no part thereof took place violates the provisions of Article III, §2 and the 6th Amendment of the United States Constitution.

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial be held in the State where the said crimes shall have

been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

U. S. Constitution, Article III, Section 2.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously been ascertained by law * * *"

U. S. Constitution, Amendment 6.

To implement these constitutional provisions, the Congress has enacted a number of laws. Chapter 5 of the Judicial Code defines in geographical terms the various judicial districts and the consequent territorial jurisdiction of the various District Courts. (Judicial Code, §§69 to 115; 28 U. S. C. §§141-196). Rule 18 of the Federal Rules of Criminal Procedure (18 U. S. C. ff. §687) provides that "except as otherwise provided by statute or by these rules, the prosecution shall be had in a district in which the offense was committed * * *." Section 42 of the Judicial Code (28 U. S. C. §103) provides that "when any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either and may be dealt with * * * in either * * *"

Count One of the indictment at bar contains, as we have seen, no allegation whatever as to where the acts charged, i. e., the acts constituting the "causing", were committed. That being so, we maintain that in the light of the Constitutional provisions and statutes set forth above, as they have been interpreted by this Court and other Circuit Courts of Appeals, the District Court had no jurisdiction and the Court below should have so held. As this Court has said:

"It must be conceded that, under the 6th Amendment to the Constitution, the accused cannot be tried in one district on an indictment showing that the offense was not committed in that district * * *."

Salinger v. Loisel, 265 U. S. 224, 232 (1924).

Or, as it was articulated in *United States v. Anderson*, 328 U. S. 699, 704-705 (1946):

"But, obviously, in view of the Sixth Amendment's provision, no such over-all effort could be effective as to any violation taking place outside that district. The constitutional specification is geographic; and the geography prescribed is the district or districts within which the offense is committed."

Not only must the conviction fail if the indictment shows that the offense was not committed in the district where it was obtained. The indictment is equally defective if, as here, it is silent as to the locale of the crime. In other words, the prosecution must plead and prove that the crime or some act constituting a part of the crime was in fact committed in the jurisdiction of the indictment. The United States did neither in the case at bar (Point I, *supra*). Cf. *Moran v. United States*, 264 Fed. 768 (C. C. A. 6, 1920); *Brightman v. United States*, 7 F. (2d) 532, (C. C. A. 8, 1925); also *Vernon v. United States*, 146 Fed. 121 (C. C. A. 8, 1906) where the Court held that failure to prove where the acts were committed warranted a directed verdict of acquittal.

- B. No part of the offense alleged in Count One was shown to have taken place in California, the jurisdiction where the offense was tried.**

Thus in determining where the trial of an offense may constitutionally be had, the inquiry must be as to where the crime itself or the separate acts constituting the crime

"have been committed" according to the Constitutional requirement. The crime alleged in Count One is the "causing to be deposited" for interstate carriage of a number of copies of an allegedly obscene book. This Count alleges that the origin of the shipment was Brooklyn, New York (R. 2). There is no allegation whatever as to where the acts of the defendant causing the deposit were committed. The trial as to guilt or innocence of these acts took place in the Southern District Court in California, the jurisdiction of which is, by Sec. 72 of the Judicial Code (28 U. S. C., §145), restricted to the territorial description therein contained. Unless it can be maintained that under a proper construction of that statute, petitioner committed some act in California, California is not the State or District where the crime was committed, and the District Court was constitutionally and under the applicable Federal statutes without jurisdiction.

Apparently recognizing its Constitutional obligation to lay the basis for the jurisdiction of the California Court by demonstrating that some part of the alleged crime in Count One took place there, the Government, in effect, placed its sole reliance on the admitted fact that the books in question were *delivered* in California.* If, therefore, causing to be *deposited* (the crime charged) is the same as causing to be *delivered*, the California Court properly took jurisdiction. If it is not, no Constitutional basis exists for the jurisdiction of the California Court.

The Court below apparently accepted the Government's theory and held that petitioner could properly be tried in

* This can be readily seen from the fact that Count One alleges the date on which petitioner caused the books to be deposited was December 31, 1945 (R. 2), which date, as Count Two clearly shows (R. 3), was the date the books arrived in California.

California for causing at a place or places unspecified,* books to be deposited for carriage from Brooklyn on the sole ground that the books were admittedly delivered in California. Its holding transgresses the Constitution, is unwarranted by statute and erroneously disregarded the relevant holdings of this Court and of other Circuit Courts of Appeals and the consistent administrative practice under the statute involved herein; moreover, the result reached is one which the Congress itself has refused to legislate.

1. This Court has consistently held that when a statute penalizes the offense of depositing (or causing to be deposited) but does not mention delivery (or causing to be delivered), which is true of the statute involved herein, the offense cannot be said to have been "committed" in the place of the delivery and the Court there has no jurisdiction.

Thus in *United States v. Stever*, 222 U. S. 167 (1911), it was conceded that since the mail fraud statute as then constituted, like the statute in the case at bar, did not mention the crime of "causing * * * to be delivered", the offense proscribed by the statute (which was different from the crime described in the "lottery" statute) was committed only at the place of deposit and could be prosecuted only in that jurisdiction, regardless of whether or not delivery was effected somewhere else. Only after the mail fraud statute was specifically amended to include the offense of "causing to be delivered" was it held that the offense could be tried in the place where the mail was delivered. *Salinger v. Loisel*, 265 U. S. at p. 234.** Despite efforts in

* Which place or places could have been in any one of the 48 States, or, indeed, in a foreign country.

** *Horner v. United States*, 143 U. S. 207 (1892), is to the same effect with regard to the lottery statute (now 18 U. S. C., §336) and letters mailed from New York to Illinois but this Court specifically pointed out that the defendant could object, at the trial in

that direction, there has been no such amendment to the statute here at issue. See *infra*.

Much reliance was placed below on *Hagner v. United States*, 54 F. (2d) 446 (C. A. D. C. 1931), aff'd. 285 U. S. 427 (1932) to support the government's contention that petitioner was properly tried in California for causing at places unknown *Call House Madam* to be deposited in Brooklyn for carriage to California. But it is of the essence of the *Hagner* case that the statute there involved, the mail fraud statute *after* it was amended (18 U. S. C. §338), specified the offense of "causing to be delivered."

2. The Statute here involved does not proscribe "causing to be delivered." Congress has refused to amend the Statute to include this offense. Yet it is this offense for which the petitioner was convicted under Count One.

Where Congress has desired to do what the Court below has in fact done herein, namely, proscribe the offense of causing offensive matter "to be delivered", it has said so. Thus the statutes dealing with mail fraud (18 U. S. C. §338), lottery material (18 U. S. C. §336), ransom or extortion letters (18 U. S. C. §338a-b) and pistols or firearms (18 U. S. C. §361) make it an offense either to "deposit" or "cause to be deposited" *or* to "cause to be delivered" (*Italics supplied*).

The failure of the statute here in question likewise to penalize one who "causes to be delivered" represents a deliberate act of omission on the part of Congress. The words used in the statute herein involved (Section 396, 18

Illinois on counts charging "caused to be delivered" in Illinois, to the counts of the indictment based on "caused to be deposited" in New York. In *Burton v. United States*, 202 U. S. 344, 389 (1906), the *Horner* case was interpreted as holding that Illinois had *jurisdiction*. Therefore the jurisdiction was derived specifically from the clause "cause to be delivered," which does not appear in the statute *sub judice*.

U. S. C.), are identical with those used in Section 334, 18 U. S. C., its counterpart dealing with the use of the mails for sending obscene matter. It has been repeatedly held that both statutes

“originated from the so-called Comstock Act of 1873 (17 Stat. 598) * * *. The statutes we have referred to were part of a continuous scheme to suppress immoral articles and obscene literature and should so far as possible be construed together and consistently.”

United States v. One Package, 86 F. (2d) 737, 739 (C. C. A. 2, 1936).

On several occasions, the Post Office Department has had bills introduced which would have allowed prosecution of the depositor in the place of delivery—the very result upheld herein by the Court below without benefit of statutory enactment, when it construed “causing to be deposited” as the equivalent of “causing to be delivered”. At the hearings on one such bill* it was frankly admitted**

* (H. R. 5370, 74th Cong., 1st sess.)

A BILL Providing a penalty for anyone who shall knowingly cause obscene matter to be delivered by mail or to be delivered at the place at which it is directed to be delivered

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the second sentence of section 211 of the Act of March 4, 1909 (35 Stat. 1129) as amended (18 U. S. C. 334), is amended to read as follows: “Whoever shall knowingly deposit or cause to be deposited for mailing or delivery, anything declared by this section to be nonmailable, or shall knowingly take, or cause the same to be taken, from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, *or shall knowingly cause the same to be delivered by mail according to the direction thereon*, or at the place at which it is directed to be delivered by the person to whom it is addressed, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.” (Italics supplied.)

** Hearings before Subcommittee 8 of the Committee on the Post Office and Post Roads, H. Reps., 74 Cong. 1st Sess., March 8, April 4 and April 10, 1935, pp. 9-10, 59-60.

that the Post Office Department was urging the amendment because it wanted to avoid bringing prosecutions in New York (where the book publishers are primarily located but where the juries are apt to be broadminded), and to obtain such indictments in communities more apt to favor convictions. Had Congress heeded the pleas of the Post Office, it is likely that all or much of our literature would have been subjected to "monkey-trials" (Dayton, Tennessee)—that the Post Office would have chosen, via entrapment,* the most unenlightened sections of the country to test the obscenity of books. The fact is, however, that Congress wisely refused—in terms—to amend either the mail statute, or inferentially, the statute here involved. Until this case was brought by the Government, it had never been suggested that a defendant could be tried under the present form of the statute in a jurisdiction whose sole contact with the alleged offense was that it was the place of delivery. This is the only such case on record so far as we have been able to determine. If the decision below is permitted to stand, a result will have been achieved which Congress itself specifically refused to bring about.

C. Jurisdiction cannot be conferred by "waiver."

We have shown that in the light of Constitutional mandates, the District Court for the Southern District of California had no jurisdiction to try the offense alleged in Count

* The not infrequent use by the Post Office Department of decoy letters can make this a simple matter. See, e.g., *United States v. Dennett*, 39 F. (2d) 564 (C. C. A. 2, 1930), where a Post Office Agent solicited the deposit for mailing of the pamphlet there in question to Grottoes, Virginia. On the theory herein upheld by the Court below, the trial of the *Dennett* case could have constitutionally taken place in Grottoes, Virginia, a possibility which not even the Government envisioned at the time.

One of the indictment herein because no part of that offense as defined by Congress took place in California. But, the Court below held that, even if this were so, the defect was "waived" by petitioner's going to trial on the merits without raising the question. The Court relied on the decision of the Court of Appeals of the District of Columbia in *Hagner v. United States*, 54 F. (2d) 446 (1931) *aff'd.* on other grounds 285 U. S. 427 (1932), and three other cases which purport to follow that decision but which on closer scrutiny are seen not to stand for the proposition for which they are cited.*

As we have already pointed out *supra*, the Federal Constitution gives no authority to the United States to take original cognizance in one State and District of crimes committed in another. *Cf. In re Rosdeitscher*, 33 Fed. 657 (D. C. Va. 1888).** Still less, we submit, can the Constitution be

* *Gowling v. United States*, 64 F. (2d) 796 (C. C. A. 6, 1933); *Mahaffey v. Hudspeth*, 128 F. (2d) 940 (C. C. A. 10, 1942), *cert. den.* 317 U. S. 666; and *United States v. Jones*, 162 F. (2d) 72 (C. C. A. 2, 1947). In the *Gowling* case, the Circuit Court held that venue was sufficiently proven and that the offense was committed in the District where it was tried; therefore the brief sentence about waiver of venue, without discussion or citation of cases, was *obiter dictum*. In the *Mahaffey* case, where the relator had previously pleaded guilty and was thereby convicted, the same result was reached on the proper place of trial under a construction of the National Stolen Property Act, 18 U. S. C., §§413-419, and therefore the statements made about "waiver" are likewise *dicta*. In the *Jones* case, the indictment clearly shows that an offense was committed in the place of trial and therefore the question of "waiver" was not necessary to the decision.

** See also *Weinberg v. United States*, 126 F. (2d) 1004 (C. C. A. 2, 1942), where the District Court in Michigan had issued search warrants relating to property situate in New York. On petition for return of the property seized, Judge C. E. Clark stated that the property would be returned since the Michigan court had no power to extend its process beyond the limits of the district. The section of the criminal code which authorizes search warrants (18 U. S. C., §611) does not have an express limitation of the district court's power to issue process only in its own district. If the underlying theory of "waiver" were correct and was applied in the case at

interpreted so as to permit an individual defendant by any form of waiver to confer jurisdiction on a Federal District Court which has none. The statute, Section 24 of the Judicial Code (28 U. S. C. §41), gives the district courts original jurisdiction of all crimes and offenses under the authority of the United States. But this is jurisdiction over the *subject matter* and not *territorial jurisdiction*. Territorial jurisdiction of the District Court in California is defined, as we have shown, by sec. 72 of the Judicial Code, 28 U. S. C. §145. This flows by necessary implication from the restrictions of Art. III, sec. 2 of the Constitution which begins "The judicial power * * *". If Congress cannot give a court jurisdiction to try an offense no part of which took place within its territory,* surely neither can a defendant accomplish such a result by any act on his part.

The Court below based its contrary view on the decision of the Court of Appeals for the District of Columbia in *Hagner v. United States*, *supra*. It was there held to be a necessary corollary from this Court's decision in *Patton v. United States*, 281 U. S. 276 (1930) that the trial by jury guaranteed by the 6th Amendment could be expressly and knowingly waived, that likewise the constitutional guarantees of Article III, §2 and the 6th Amendment as to permissible place of trial could also be waived. In the *Hagner* case, however, the Court of Appeals for the District of

bar, the territorial jurisdiction would not matter and the process could extend beyond the district court in Michigan. Yet the decision by Judge Clark held that the blanket grant of power to issue process would be, as we contend Section 24 of the Judicial Code (28 U. S. C., §41) must be, limited by necessary implication due to the constitution provisions. *Cf. Horn v. Marquette Railroad*, 151 Fed. 626,631 (C. C. Mich., 1907) where Judge (later Mr. Justice) Lurton said that the federal courts of different states are foreign courts to each other with reference to extra-territorial jurisdiction.

* In *United States v. Smith*, 173 Fed. 227, 231 (D. C. Ind., 1909), the Court expressed the opinion that this would be unconstitutional.

Columbia found that these latter constitutional provisions had been waived, not by an express and knowing waiver as in the *Patton* case, but by the defendant's going to trial in the jurisdiction where the indictment was obtained.

Since this Court found that the indictment in the *Hagner* case had properly charged an offense committed within the District of Columbia, the locale of the trial, it declared it "unnecessary to consider the further question whether the Trial Court had jurisdiction to try the indictment, if construed as charging the commission of an offense only in Pennsylvania" (285 U. S. at 433-434). The question came up again in *United States v. Anderson*, 328 U. S. 699 (1946) where the Government took a similar position to the one we are urging here.* Once again this Court found that "we need not decide that question in this case" (328 U. S. 699, at p. 702, f. 4).

The question whether the provisions of Article III, §2 and the 6th Amendment having to do with territorial jurisdiction to try offenses can be "waived"—which this Court expressly left undecided in the *Hagner* and *Anderson* cases—is squarely raised by the case at bar. We submit that only one answer is possible—there can be no such thing as jurisdiction by waiver.

There is a significant difference between such a constitutionally guaranteed right as trial by jury which impinges only on a particular defendant in a particular case, and provisions of the Constitution such as those here at issue which not only give a right to a defendant but which also define the jurisdiction of courts. The Federal Rules of Civil Procedure themselves recognize the distinction, since

* The Selective Service Act (50 U. S. C. A., Appendix, Sec. 311) provided for trial "in the district court of the United States having jurisdiction thereof." The Government argued that this was not a mere venue provision but prescribed a non-waivable territorial jurisdiction.

they specifically provide that unlike other defenses or objections, lack of jurisdiction may be raised at any time during the pendency of the proceedings. Rule 12(b)(2); 18 U. S. C. following §687. Assuredly no defendant by any form of waiver can enlarge the jurisdiction of a court to try him for an offense not committed within its territorial radius.

There is a further reason why the finding of the court below as to waiver was clearly in error. Even if waiver of jurisdiction were otherwise possible, the acts of petitioner in the case at bar fall far short of the express waiver which this Court in the *Patton* case, *supra*, insisted be present before it would find even a waiver of the right to trial by jury. Petitioner moved to dismiss the indictment at the trial (R. 7) and subsequently moved for a new trial (R. 17). This Court has repeatedly cautioned against findings of waiver by implication such as was made below. See, e. g., *Thompson v. Utah*, 170 U. S. 343 (1898); *Johnson v. Zerbst*, 304 U. S. 458, 464-465 (1938).

Whether or not we are correct in our contentions that no waiver of the jurisdictional provisions of Article III, §2 and the 6th Amendment is possible and that at the very least there can be no such waiver by implication, we submit that these are questions of far reaching importance which this Court has heretofore left open and which are squarely presented for decision by the case at bar. On this ground alone, we urge that the writ prayed for should issue.

POINT III.

In upholding convictions for two separate crimes based on the same act, the Court below sanctioned the placing of petitioner in double jeopardy in violation of the Fifth Amendment to the United States Constitution and the applicable decisions of this Court, and erroneously disregarded all prior administrative construction of the act in question.

Factually speaking, the indictment in the case at bar charged petitioner with having done a single act at a place or places unspecified—namely, causing certain allegedly obscene books to be deposited for carriage from Brooklyn to California. The judgment of the District Court basing two separate convictions on this one act—one for causing to be deposited and one for causing to be taken—was affirmed by the Court below. In so doing the Court disregarded the applicable decisions of this Court interpreting the controlling provisions of the Fifth Amendment which prohibits double jeopardy.

A. The conviction on both counts violates the double jeopardy provisions of the Fifth Amendment.

The Fifth Amendment to the Constitution of the United States states:

“* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.”

In interpreting this Constitutional mandate, this Court has pointed out its meaning:

“Where * * * a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of these incidents without being twice put in jeopardy for the same offense”* *In re Nielsen*, 131 U. S. 176, 189 (1889).

In the *Nielsen* case, the defendant after having been convicted of unlawful cohabitation with more than one woman was convicted of adultery by virtue of the same cohabitation. It was held to be double jeopardy because, of necessity, the adultery was part of the *res gestae* of the unlawful cohabitation. Compare *Blockburger v. United States*, 284 U. S. 299 (1932) and *Ebeling v. Morgan*, 237 U. S. 625 (1915) in each of which, unlike in the case at bar, “something new was added” which warranted the holdings that more than one crime had been committed. In the *Blockburger* case, the defendant was charged in different counts with different sales of morphine at different times, although some of these were to the same person. This court in affirming the conviction pointed out that there were “new impulses” in each new sale and different evidence was needed to prove each new count. In the *Ebeling* case, a conviction on several counts of wilfully tearing several mail bags with intent to rob was sustained because the cutting of each bag involved a separate and distinct act. Applying that doctrine to the case at bar: if petitioner had forwarded several shipments of books, there would have been separate impulses, and there could have been several counts in the indictment—one for each shipment. In the instant case however, there was only a *single* impulse arising from a *single* deposit.

* It goes without saying that it is no less double jeopardy where, as here, he is simultaneously convicted of two crimes for doing the same act.

"But the test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made punishable by the act of Congress."

Morgan v. Devine, 237 U. S. 632, 640 (1915).

Again, in *Caballero v. Hudspeth*, 114 F. (2d) 545 (C. C. A. 10, 1940) an indictment charged in two counts transportation of a woman for purposes of prostitution and for purpose of unlawful cohabitation, under the White Slave Traffic Act, 18 U. S. C. §398; the Court held there was but one transportation and therefore a single offense.

Both counts of the indictment herein were based on exactly the same act—no "new impulse" was present. The Court below said, with reference to Count Two:

"There is no merit in the contention that the evidence did not warrant a finding of guilt as to Count 2. Count 2 charged the offense of knowingly causing to be taken from a common carrier matter the depositing of which for carriage §245 of the Criminal Code, 18 U. S. C. A. §396 made unlawful, namely, 100 copies of 'Call House Madam.' The evidence shows that appellant did knowingly cause such taking. This he did by accepting an order from a customer (Ye Olde Book Shoppe) at San Diego, California, and by causing the copies to be deposited with a common carrier at Brooklyn, N. Y., addressed to the customer at San Diego. The customer took the copies from the common carrier as appellant obviously intended it should. It is idle to deny that appellant caused such taking" (R. 63-64).

Thus the Court below admits grounding two convictions on exactly the same facts as, of course, it did.

- B. In sustaining the conviction on both counts, the court below erroneously interpreted the statute in utter disregard of its meaning and uniform administrative construction.**

If the Court below were correct in thus interpreting the statute herein involved to mean that identical facts could be made the basis of a conviction for "causing to be deposited" and "causing to be taken," the Fifth Amendment and the decisions of this Court, discussed *supra*, would have required the Government to elect which of the two offenses it wished to prosecute. However, the history of the statute here at issue and analogous Federal statutes, as well as the consistent pattern of administrative construction accorded to them, reveals that the statute here in question (18 U. S. C. §396) punishes two distinct acts—i.e., "depositing" (or "causing to be deposited") and "taking" (or "causing to be taken"), and that the Court below was clearly in error when it held that the same set of circumstances could prove both. The question of statutory construction thus raised is an important question of Federal law which has not been but should be decided by this Court.

The statute herein involved, like the analogous mail statute (18 U. S. C. §334) declares criminal anyone who either "shall * * * knowingly deposit or cause to be deposited" obscene matter with a common carrier *or* anyone who "shall knowingly take or cause to be taken" from a carrier "any matter or thing, the depositing of which for carriage is herein made unlawful * * *." The use of the disjunctive "or" in the law is cogent indication that two separate persons were contemplated.* On the interpretation

* In *United States v. Johnson*, 323 U. S. 273 (1945), this Court held that the Federal Denture Act, 18 U. S. C. A., §§420-f through 420-h, which makes it a crime to "use the mails or any instru-

of the Court below, the word "and" should obviously have been used, since under the holding it necessarily follows that anyone "depositing or causing to be deposited" also is guilty of "taking or causing to be taken" if the material is in fact delivered to the consignee by the carrier. Moreover, if it were intended to punish the same person for both "depositing" and "taking" based on the same acts, it would be unnecessary to state that the taking must be of "any matter or thing, the depositing of which is hereunder made unlawful." Appendix B attached to this brief contains a chart of analogous Federal statutes, showing clearly that Congress has in no case intended that the person who "deposits" or "causes to be deposited" objectionable matter for carriage automatically becomes guilty also of "causing [such matter] to be taken" solely because it reaches its consignee.

There have been hundreds of prosecutions under these various statutes yet a careful search has not revealed a single case, other than the case at bar, in which a defendant was convicted for both "causing to be deposited" and "causing to be taken" on the basis of a single allegation asserting merely deposit with a carrier.* The fact that, as the Court below says, he "intended" that the customer

mentality of interstate commerce" contemplated two different persons, the sender and the importer (at p. 277). Surely "use the mails" is more readily susceptible than the statute at bar of the interpretation that both the act of depositing and the act of causing to be taken from the mails may constitute crimes committed by the same person, i.e. the sender. Nevertheless this Court, by ruling as it did, rejected such interpretation, and held the crime of the person who "sent" was complete when he deposited.

* Cf. *United States v. Comerford*, 25 Fed. 902 (D. C. Texas, 1885), which held that the act of depositing in the mails is an entire offense completed at the place of deposit. Similarly, in *United States v. Chase*, 27 Fed. 807 (C. C., Mass.) (certified questions answered 135 U. S. 255) on an indictment for depositing an obscene letter in the mail, the defense was raised that the letter was

should take the books from the carrier has never before been thought the equivalent of "causing it to be taken".

Again it should be noted that if the statute in its present form permits an indictment in the place of receipt for "causing to be taken" to be based on an allegation merely that the defendant had caused the books "to be deposited" somewhere else for delivery there, presumably the mail statute which is similarly worded permits the same construction. If this were so, the efforts of the Post Office Department to amend the statute so as to permit prosecution in the place where the matter is delivered (which is also the place of "taking"), as well as the place where it is deposited (discussed fully *supra*), would be utterly meaningless. By sustaining Count Two on the grounds of alleged deposit and delivery only, the Court below, as in the case of Count One, achieved without benefit of legislation a result which Congress has explicitly refused to legislate.

Therefore, even if the result below were not condemned as it is by the double jeopardy provisions of the Fifth Amendment, it would nonetheless be untenable in the light of the wording of the statute itself, its Congressional history and finally the consistent administrative construction of that statute. The actual construction of an act of Congress by those charged with its administration is entitled to great weight (*Billings v. Truesdell*, 321 U. S. 542, 552-553 (1944); *United States v. Farrar*, 281 U. S. 624 (1930)) and should not be disturbed by the courts except for very cogent reasons. No such reasons exist here. In the *Farrar* case,

not mailed for the purpose of circulation or disposition. The lower court replied (at p. 808):

"The clause in the Act of 1876 'for the purpose of circulating or disposing of, or aiding in the circulation or disposing of, the same' applies only to the offense of taking an obscene publication from the mails, and not to that of depositing one in them."

supra, the defendant was charged with violation of the National Prohibition Act by virtue of having purchased liquor. This Court, in rejecting the contention that Congress intended the purchaser to be guilty equally with the seller, said:

"If aid were needed to support this view of the matter, it would be found in the fact, conceded by the Government's brief, that during the entire life of the National Prohibition Act, a period of ten years, the executive departments charged with the administration and enforcement of the act have uniformly construed it as not including the purchaser in a case like the present; no prosecution until the present one has ever been undertaken on a different theory; and Congress, of course well aware of this construction and practice, has significantly left the law in its original form" (281 U. S. 624, 634).

- C. The indictment herein does not allege, nor was any evidence adduced to prove, the crime of "causing to be taken" as distinct from the crime of "causing to be deposited." There was thus a complete failure of proof as to the second count.**

We submit that to prove the separate statutory crime arising from "taking" from the carrier, in addition to the statutory crime arising from depositing, there must be some additional act, after the interstate carriage ends, by the person charged with that crime. There is no proof of any such additional act here by petitioner, and none may be presumed. On the face of the record he did not take the books from the carrier. Ye Olde Book Shoppe accepted delivery (R. 9) from the carrier. Nor did the petitioner cause the books to be taken by "intending them to be taken." As there has thus been complete failure of proof on Count 2 of the Indictment, the Court below was clearly in error when it sustained the conviction on that Count.

POINT IV.

Since the instant case involves rights guaranteed by the First Amendment to the United States Constitution, and the Court below made no attempt to apply the "clear and present danger" test to it, the decision below is in probable conflict with applicable decisions of this Court.

This Court has long recognized that uncertainty exists in appraising the effect of the spoken or printed word on human beings. Moreover since free speech and a free press are "the matrix, the indispensable condition, of nearly every other form of freedom,"* this Court has repeatedly and rigorously scrutinized every repressive statute that has come before it and has by a long series of cases "pinpricked out" the clear and present danger rule as a criterion of permissible restraint. The rule is: will the speech or publication complained of create a clear and present danger of the harm which the Legislature sought to prevent?

Neither "inherent tendency" in nor "reasonable tendency" is enough to justify a restriction of free expression. *Bridges v. California*, 314 U. S. 252, 273 (1941).

"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high * * *"
(*Bridges v. California*, *supra*, at p. 263).

This Court has never addressed itself to the impact of this rule in obscenity cases. However it is a necessary inference from the Court's prior decisions that the test

* *Palko v. Connecticut*, 302 U. S. 319, 327 (1937).

applies in *every* case involving freedom of speech and the press.*

In the case at bar, no evidence was introduced by the prosecution and no finding was made either by the District Court or by the Court below that there was clear and present danger that *Call House Madam* would corrupt or deprave. True, the Trial Court found it "repulsive" (R. 45) but reading matter which repels may well have the opposite effect of that frowned on by obscenity laws. In any event, the question of the applicability of the clear and present danger test to obscenity cases and the further question whether that test can be said to have been complied with in the case at bar (the prosecution having introduced no evidence whatever on the subject), are both federal questions of fundamental importance which have not been but which, we submit, should be decided by this Court.

* The "clear and present danger" rule represents the only exception which this Court has permitted to the blanket ban against abridgments on freedom of speech and of the press even where the alleged abridgment is premised on such a ground as sedition or espionage which goes to the foundation of the State itself. See e.g. *Schenck v. United States*, 249 U. S. 47 (1919). *A fortiori*, no broader exception can be recognized in the case of obscenity prosecutions which charge a far less serious offense.

Conclusion.

For the foregoing reasons your petitioner, by his attorney, respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the cause may be reviewed and determined by this Court and that the judgment of the Circuit Court of Appeals be reversed.

Respectfully submitted,

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Appendix A.**UNITED STATES CODE, TITLE 18, SECTION 396**

(Criminal Code, Section 245, amended.) Importing and transporting obscene books. Whoever shall bring or cause to be brought into the United States, or any place subject to the jurisdiction thereof, from any foreign country, or shall therein knowingly deposit or cause to be deposited with any express company or other common carrier, for carriage from one State, Territory, or District of the United States or place non-contiguous to but subject to the jurisdiction thereof, to any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States, through a foreign country, to any place in or subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States to a foreign country, any obscene, lewd, or lascivious, or any filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character, or any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of the hereinbefore mentioned articles, matters, or things may be obtained or made; or whoever shall knowingly take or cause to be taken from such express company or other common carrier any matter or thing the depositing of which for carriage is herein made unlawful, shall be fined not more than \$5,000, or imprisoned not more than five years, or both. (Feb. 8, 1897, C. 172, 29 Stat. 512; Feb. 8, 1905, C. 550, 33 Stat. 705; Mar. 4, 1909, C. 321, §245, 35 Stat. 1138; June 5, 1920, C. 268, 41 Stat. 1060.)

Appendix B.*

1. Statutes expressly penalizing the offense of "cause to be delivered" in addition to the offense of "cause to be deposited."

A. *Offenses against the Mails.*

18 U. S. C., §336 (Criminal Code, §213)	Lottery material	"* * * whoever shall knowingly deposit or cause to be deposited, or shall knowingly send or cause to be sent * * * or shall knowingly cause to be delivered * * *."
18 U. S. C., §338 (Criminal Code, §215)	Using mails to defraud	"* * * shall place or cause to be placed * * * in any post office * * * matter, to be sent or delivered by the post office establishment * * * or shall take or receive any such therefrom * * * or shall knowingly cause to be delivered by mail * * *."
18 U. S. C., §338a	Threatening Communications	"* * * shall deposit or cause to be deposited * * * or shall knowingly cause to be delivered * * *."
18 U. S. C., §340 (Criminal Code, §217)	Poisons or explosives	"* * * shall knowingly deposit or cause to be deposited * * * or shall knowingly cause to be delivered * * *."
18 U. S. C., §361	Pistols and fire-arms	"* * * deposit or cause to be deposited * * * or cause to be delivered by mail * * *."

B. *Offenses against Foreign and Interstate Commerce.*

18 U. S. C., §385 (Criminal Code, §235)	Consignor properly marking packages containing explosives	"* * * deliver or cause to be delivered to any common carrier * * * any explosive * * * under false and deceptive marking * * *."
18 U. S. C., §388 (Criminal Code, §238)	Delivery by employees of carrier of liquor to other than bona fide consignee	"Any officer, agent or employee of * * * any common carrier who shall knowingly deliver or cause to be delivered to any person other than * * *."

* Emphasis herein supplied.

2. Statutes, including the statute herein involved, 18 U. S. C. §396, which penalize the offense of "deposit" or "cause to be deposited," and the offense of "take" or "cause to be taken," but which do not penalize the offense of "cause to be delivered."

A. Offenses against the Mails.

18 U. S. C., §334 (Criminal Code, §211)	Obscene matter	" * * * deposit or cause to be deposited * * * or shall knowingly <i>take</i> or <i>cause the same to be taken</i> from the mails * * *."
18 U. S. C., §335 (Criminal Code, §212)	Obscene matter on wrappers or envelopes	" * * * deposit, or cause to be deposited * * * or shall knowingly <i>take</i> * * * or <i>cause the same to be taken</i> * * *."
18 U. S. C., §338c	Foreign divorce matter	" * * * deposit, or cause to be deposited * * * or shall <i>take</i> or <i>cause the same to be taken</i> * * *."

B. Offenses against Interstate and Foreign Commerce.

18 U. S. C., §387 (Criminal Code, §237)	Lottery tickets	" * * * deposit or cause to be deposited * * * or shall knowingly <i>take</i> or receive, or <i>cause to be taken</i> or received * * *."
18 U. S. C., §396 (Criminal Code, §245)	Obscene matter	"deposit or cause to be deposited * * * or whoever shall knowingly <i>take</i> or <i>cause to be taken</i> * * *."

OPPOSITION

BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 591

MARCEL RODD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 60-64) is reported at 165 F. 2d 54.

JURISDICTION

The judgment of the circuit court of appeals was entered December 16, 1947 (R. 65). On January 8, 1948, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including February 14, 1948 (R. 67). The petition was filed February 14, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended

by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner waived any challenge to the sufficiency of the allegation of venue in count 1 and to proof of venue by failing to raise either question in the trial court.

2. Whether the offenses of causing an obscene book to be deposited with a common carrier for shipment in interstate commerce and of causing the book to be taken from the carrier are identical offenses, and whether the evidence is sufficient to establish the latter offense.

3. Whether, after finding that the book was obscene within the meaning of Section 245 of the Criminal Code, the trial judge was required to find in addition that there was a clear and present danger that the book would corrupt or deprave those who read it.

STATUTE INVOLVED

Section 245 of the Criminal Code (18 U. S. C. 396) provides in part:

Whoever shall * * * knowingly
 * * * cause to be deposited with any
 * * * common carrier, for carriage
 from one State * * * to any other
 State * * * any obscene, lewd, or
 lascivious, or any filthy book * * * or
 whoever shall knowingly * * * cause
 to be taken from such * * * common
 carrier any matter or thing the depositing

of which for carriage is herein made unlawful, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

STATEMENT

On May 8, 1946, petitioner was indicted in the United States District Court for the Southern District of California in two counts charging violations of Section 245 of the Criminal Code. Count 1 (R. 2) alleged that on or about December 31, 1945, petitioner knowingly caused to be deposited with a common carrier for carriage from New York to California one hundred copies of a book, entitled *Call House Madam*, which book was obscene, lewd, lascivious and filthy. Count 2 (R. 3) charged that petitioner knowingly caused the books to be taken from the common carrier at the completion of the shipment. The material facts were stipulated (R. 8-10, 10-13) and the only contested issues at the trial were whether the book is obscene and whether petitioner acted knowingly (R. 32, 37-38).¹ The district court found against petitioner on these issues (R. 45), and he was convicted on both counts. He was sentenced on count 1 to pay a fine of \$2,500; imposition of sentence on count 2 was suspended for a period of two years and petitioner was placed on probation on condition that he should not have any connection with the publication of any obscene literature and that he should not violate any

¹ Petitioner testified orally on this issue (R. 39-41).

laws (R. 18-20). Upon appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgment was affirmed (R. 65).

The facts in support of the judgment of conviction may be stated as follows:

Petitioner operates the "Marcel Rodd Company" in Los Angeles, California. On October 1, 1945, he became a distributor of a book entitled *Call House Madam*. On December 14, 1945, pursuant to an order received from Ye Olde Book Shoppe in San Diego, California, petitioner caused to be deposited with a common carrier at Brooklyn, New York, one hundred copies of the book for carriage to San Diego, California, the books being addressed to Ye Olde Book Shoppe in San Diego. The books were carried by the common carrier and were delivered to the consignee on December 31, 1945. (R. 8-9).

Petitioner had read *Call House Madam* in 1942 (R. 41). In a letter (see Govt. Exh. 3; R. 9)² to the book selling trade dated December 1, 1945, petitioner stated, in part:

Although this office has never received any communication respecting the mailability of this title either from the Post Office or any other source, it is Company policy not to mail this book and to use Railway Express for small shipments and freight services for large shipments.

² The original exhibits are on file with the Clerk of this Court.

Although Railway Express charges for shipping this title, depending on the customer's location, very considerable and run in some cases as high as 35¢ a copy, we are making a maximum charge to customers of 10¢ a copy to cover all packing, freight, and insurance. Thus customers are not being penalized by our Company policy.

We request all customers not to use the mails when shipping *Call House Madam*.³

The book, which is before the Court as an original exhibit, purports to be the racy memoirs of the proprietress of houses of prostitution. The bulk of the book is a discursive collection of stories, anecdotes, descriptions and songs of an obscene and lascivious nature, tied together by the common thread of prostitution. The text reveal it to be an obviously successful effort at pornography.

ARGUMENT

1. The only contested questions at petitioner's trial were whether the book is obscene and whether petitioner acted knowingly in committing the offenses in question (R. 32, 37-38). The trier of facts found against petitioner on these issues (R. 45), and petitioner does not contest those findings.

Petitioner's basic contention in this Court (Pet. 9-28) is that the Southern District for California is not the proper venue for the trial of the offense

³ The book was banned from the mails (see R. 40).

alleged in count 1, because it does not appear from the indictment that his act of causing the books to be deposited for carriage occurred in that district. He argues that unless the offense occurred in that district he cannot be tried there even with his consent. The venue contention was made for the first time in the circuit court of appeals and was rejected by that court on the ground of waiver (R. 62). We think it plain that the district court did not lack power to try petitioner, and that, if petitioner desired to contest the venue of the court, he should have raised the question in the district court prior to trial.

Count 1 (R. 2) alleges that—

On or about December 31, 1945, Marcel Rodd did knowingly and feloniously cause to be deposited with a common carrier, to wit: National Carloading Corporation, for carriage from Brooklyn, State of New York, to San Diego, San Diego County, State of California, *within the Southern Division of the Southern District of California*, one hundred copies of a certain book, entitled "Call House Madam" by Serge G. Wolsey, contained in wrappers addressed to Ye Olde Book Shoppe, 900 Broadway, San Diego, California, which book was obscene, lewd, lascivious and filthy. [Italics supplied.]

Apparently it was the theory of the pleader that the offense occurred in the Southern District of California, otherwise there would have been no

reason for the italicized language in count 1.⁴ If petitioner desired to challenge the validity of count 1 on the ground that it did not adequately show venue in the District Court for the Southern District of California, the opportunity was available to him prior to trial, in conformity with the procedure provided in Rule 12 of the Federal Rules of Criminal Procedure. Or, if he desired to challenge the venue of the court, the objection could have been raised at the trial by asserting that the Government's evidence did not establish that the offense was committed in that district. Petitioner did neither. Instead he expressly stipulated that the cause should be transferred from the Southern Division to the Central Division of the Southern District of California (R. 4), and he assured the trial court that the only contested issues were whether the book was obscene and whether he acted knowingly. Venue was not a contested issue in the case.⁵

⁴ Petitioner's assumption that there is no venue allegation in count 1 is unfounded.

⁵ In seeking to meet the holding of the court below that he waived the venue point, petitioner now asserts (Pet. 18) that he moved to dismiss the indictment at the trial and subsequently for a new trial. He is careful not to say that these motions were predicated on the ground upon which he now relies. Nothing in the record suggests that the contention was even thought of until new counsel (see R. 24-25) came into the case on the appeal.

None of the considerations advanced by the opinions in *United States v. Johnson*, 323 U. S. 273, as showing the importance to a defendant of not being forced to stand trial in a foreign district are applicable here. For petitioner was

In circumstances such as these, it is settled that the question of venue may not be asserted for the first time on appeal. Where the attempt to do so has been made, the courts have declined to consider it. *Sloane v. United States*, 47 F. 2d 889 (C. C. A. 10); *Benway v. People of Michigan*, 26 F. 2d 168, 169 (C. C. A. 6), certiorari denied, 278 U. S. 615; *Philipian v. United States*, 20 F. 2d 532 (C. C. A. 6); *United States v. Bushwick Mills*, 165 F. 2d 198 (C. C. A. 2); compare *Ledbetter v. United States*, 170 U. S. 606, 613-614; *Hagner v. United States*, 285 U. S. 427, 433. The question is not whether a timely attack on the adequacy of the venue allegations would have been successful. It is for this reason that the many decisions relied upon by petitioner in which the challenge was asserted in time do not aid him here.

Petitioner seeks to meet the argument that he consented to venue in the district in which he was convicted by contending that if the offense did not in fact occur in the Southern District of California, that court lacked jurisdiction to try the case, and that his trial was in violation of Article III, Section 2, and the Sixth Amendment of the Constitution. None would dispute the fact that a defendant may not against his will be brought to trial for a federal offense in a district tried in the district in which he maintains his place of business. The Southern District of California is the one district in the country which is not foreign to him.

other than that in which the offense occurred. Assuming that the offense here did not occur in the Southern District of California—an assumption which is not required by the record^{*}—the question is whether the defendant may waive his constitutional right as to the place of trial and consent to disposition of the case in another district.

Both the decided cases and the Federal Rules of Criminal Procedure answer that question in the affirmative. On facts not unlike the facts here, the circuit courts of appeals have uniformly said that a defendant has waived his right to be tried in one district by a proceeding to trial without objection in another district. *Hagner v. United States*, 54 F. 2d 446 (App. D. C.), affirmed on another ground, 285 U. S. 427; *United States v. Jones*, 162 F. 2d 72 (C. C. A. 2); *Mahaffey v. Hudspeth*, 128 F. 2d 940 (C. C. A. 10), certiorari denied, 317 U. S. 666. See, also, *Patton v. United States*, 281 U. S. 276, where this Court held that the rights conferred by Article III, Section 2, of the Constitution are for the benefit of the defendant and may be waived by him; compare *Adams v. United States ex rel. McCann*,

^{*} If, as seems likely, petitioner sent his order to the publisher from the district of his place of business, the Southern District of California, the offense of *causing* the transportation occurred in the district in which he was tried. Inasmuch as petitioner stipulated the fact of causation without raising any question of venue, no evidence was introduced as to where the offense was committed.

317 U. S. 269 (waiver of jury trial by defendant who had previously waived his right to counsel).

The Federal Rules of Criminal Procedure similarly recognize this. Rule 20 specifically provides that a defendant who is apprehended in a district other than that in which he was indicted and who desires to plead guilty may waive his right to be tried in the district where the offense occurred and request that the case be transferred to the district where he was apprehended, where his plea may be made and judgment entered. And Rule 21 (a) permits a defendant who believes he cannot obtain a fair and impartial trial in the district where the offense occurred to move for transfer of the case to another district. Quite plainly, if petitioner's contention is sound, Rules 20 and 21 (a) are unconstitutional.⁷ Nothing in the decided cases supports this conclusion.

This Court has considered a related problem on habeas corpus. It has been urged in challenging a judgment of conviction of a state court that venue was not alleged in the information and that the convicting court was therefore without

⁷ This seems to have been the view of Judge Fee of the District of Oregon in respect of Rule 20 (*United States v. Bink*, 74 F. Supp. 603), but in a later case (*United States v. Henry Clay Green, D. Oreg.*, No. C 17037), Judge Fee apparently has abandoned that theory and has ordered the clerk of the court to transfer the case in compliance with Rule 20. The court's written opinion in the second case has not yet been filed.

jurisdiction. In *Knewel v. Egan*, 268 U. S. 442, 446, this Court rejected the contention as follows:

* * * A mere failure to allege venue and thus to show affirmatively that the crime was committed within the territorial jurisdiction of the court, does not deprive the court of jurisdiction over the cause and the sufficiency of the indictment cannot be called in question upon *habeas corpus*. Even though an indictment thus drawn might have been found defective upon demurrer or writ of error, it is not so fatal, upon its face, as to be open to collateral attack after trial and conviction. * * *

Accord: United States v. Pridgeon, 153 U. S. 48, 59; *Hogan v. O'Neill*, 255 U. S. 52.

Apart from the technical legal considerations, there are compelling practical reasons in this case why petitioner should not be permitted to challenge the venue of the court for the first time on appeal. It is plain from the fact that the indictment was returned in the Southern District of California and from the language of the first count that the Government was of the view that venue properly was in that district. Everything that petitioner did in the trial court convincingly demonstrated that he did not challenge that view. In these circumstances the trial judge, too, proceeded on the assumption that there was no question of venue in the case. It was in this context that the trial judge imposed a fine on

petitioner on the first count and suspended sentence on the second count. It is not unreasonable to assume that if there had been any question concerning the validity of the conviction on the first count, the trial judge either would have imposed a general fine which could be supported by either count, or a fine on a second count. This is one reason why the doctrine of waiver has an appropriate place in this case. In no substantial sense can it be said that petitioner has been prejudiced by the proceedings in the Southern District of California.

2. Petitioner's second contention (Pet. 29-35) likewise reflects the efforts of counsel who came into the case on the appeal to escape from the concessions made by petitioner's counsel in the trial court. As we have shown, petitioner told the trial judge that the only contested questions were whether he acted knowingly and whether the book was obscene. The stipulated facts were intended by both sides to remove all other questions from the case. Now, however, it is urged that the evidence does not demonstrate that petitioner caused the books to be taken from a common carrier, as alleged in count 2, and that, in any event, counts 1 and 2 charge identical offenses. That identical offenses are not involved seems plain. Count 1 includes as an ingredient the deposit of the proscribed books with a common carrier. Count 2 reaches the taking of the books

from the carrier. One strikes at the first step in the illegal transaction and the other reaches the final step. Congress, of course, may punish each step in the transaction, and that is what it has done here. *Albrecht v. United States*, 273 U. S. 1, 11-12; *United States v. Michener*, 331 U. S. 789. And at least since *Gavieres v. United States*, 220 U. S. 338, it has been clear that the fact that different offenses may be established by using the same testimony does not involve any element of double jeopardy. In *Pinkerton v. United States*, 328 U. S. 640, 643-644, where on evidence showing participation in an unlawful conspiracy the defendant was convicted both for the conspiracy and for the completed substantive offense which was the object of the conspiracy, this Court rejected a plea of double jeopardy with the reminder that "It is only an identity of offenses which is fatal."

The stipulated evidence shows that petitioner, as distributor of the obscene book, directed the shipment of 100 copies of the book to one of his customers. The books were shipped and they were taken from the common carrier by the customer. Quite plainly if petitioner had directed that the books be delivered to him, and if they were thereafter shipped by him to his customer, he would have violated the clause of Section 245 of the Criminal Code which interdicts the taking of the books from the common carrier. The situation is

no different where he avoids this by directing delivery of the books to the customer. In a very real sense he has caused the proscribed taking of the books from the carrier. He brought it about, and it is in this sense that "cause" is used in the statute. Cf. *United States v. Kenofskey*, 243 U. S. 440, 443.

3. Petitioner's final contention (Pet. 36-37) is that the Government was required to prove and the trial judge was required to find "that there was a clear and present danger that *Call House Madam* would corrupt or deprave." This, too, is a contention which is made in the appellate proceedings for the first time. The short answer to the argument is that nothing in the history or application of the clear and present danger rule requires that where Congress already has found that obscene books are a serious evil and should not be permitted the facilities of interstate commerce, the trial court must make a further finding that the particular obscenity involved would corrupt and deprave those who read the book. Inherent in the finding that the book is obscene is the determination that it is one which will accomplish the evil at which Congress quite properly has struck. Petitioner recognizes (Pet. 36-37) that this Court has never applied the clear and present danger test in the manner for which he contends, and nothing which he urges in any way suggests the necessity for the test in this case any more than in any case of libel or slander. The

right to free speech and to a free press has never been thought to include the right to utter defamatory statements or the right to publish obscenity. And certainly obscenity cannot claim to stand on a higher constitutional footing than fraud. Cf. *Donaldson v. Read Magazine*, No. 50, this Term, decided March 8, 1948.

CONCLUSION

The petition presents no matter of substance, particularly when viewed in the context of the proceedings in the district court and the concessions there made by petitioner. There is no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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